Exhibit 9

In The Matter Of:

Olson v.

J&J

May 10, 2019

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - CIVIL TERM - PART 7

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DONNA A. OLSON and ROBERT M. OLSON,

Plaintiff,

-against-

Index No.
190328/2017

BRENNTAG NORTH AMERICA, INC.;
BRENNTAG SPECIALTIES, INC.,
Individually, and f/k/a Mineral Pigment Solutions, Inc., as successor-in-interest to Whittaker, Clark & Daniels, Inc.,
CYPRUS AMAX MINERALS COMPANY,
Individually and as successor-in-interest to American Talc Company, Metropolitan Talc Company, Inc., Charles Mathieu, Inc., and Resource Processors, Inc.;
IMERYS TALC AMERICA, INC.,
JOHNSON & JOHNSON CONSUMER, INC.;
WHITTAKER, CLARK & DANIELS, INC.,
Individually and as successor-in-interest To American Talc Company, Metropolitan Talc Company, Inc., Charles Mathieu, Inc., and Resource Processors, Inc.;

Defendants.

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TRIAL

60 Centre Street
New York, New York
May 10, 2019

B E F O R E:

HONORABLE GERALD LEBOVITZ,
Justice; and a jury

(Appearances on following page)

ALAN F. BOWIN, CSR, RMR, CRR
BONNIE J. BICCIRILLO, CSR, CRR
Official Court Reporters

Proceedings

AFTERNOON SESSION

* * * * *

THE COURT: Shall we talk about Exhibit 44?

MR. BLOCK: We still need -- do we have that testimony that was linked with it?

We were looking for some testimony that forms a basis of our application. We don't have that pulled just yet. It is in my memory, but we're trying to find it in the transcript.

THE COURT: Do you want to do the motion to strike Dr. Longo's testimony?

MR. KURLAND: Sure. I do want to address -- I thought there was one other thing. We have the Blount thing.

THE COURT: You want to do Blount first?

MR. KURLAND: Whatever the Court is thinking. It would make sense to deal with the rebuttal case, the purported rebuttal case.

So we could do that if you guys are ready?

MR. HARTLEY: Yes, Ms. Samadi is going to argue this.

THE COURT: It is the plaintiffs' request for the Blount report you want to talk about first?

MR. KURLAND: Yes.

THE COURT: Ms. Samadi, whenever you are ready.

MS. SAMADI: Thank you, your Honor.

Your Honor, as we have filed in our letter, there has been much discussion in this trial about Dr. Blount and her testing of Johnson & Johnson Baby Powder.

As we admitted Exhibit 13, which is the Exhibit 1 to the letter that we have, that is a letter from Dr. Alice Blount to M. Raymond Hatcher at a law firm and that letter says, I quote from Dr. Blount:

"I have written and enclosed a report on the occurring regulation and up-to-date scientific views of asbestos amphiboles and intermediate fibers."

And as we were looking through our document production, we noticed that the attachments to the letter, we have the -- she also attached two other documents. She attached a 1990 study and 1991 study, but they did not include or produce the attachment that appears to be a 16-page report from Dr. Blount.

So, we think it is discoverable. We think it is relevant. It is on their we think -- what we think is their -- is the Blount report because we're still not sure because all we have is the privilege log.

So we would request that it be provided. We -- they initially alleged attorney-client privilege on it. It is not between an attorney and a client as far as we know, and I think it is fair to say Dr. Blount was never a client

of the Mehaffy firm.

And even if that was the case, they have waived the privilege because they have waived the privilege over the letter that -- the Exhibit 13, they let it come into evidence without objecting to it and they produced it in discovery.

And they also waived any privilege on the issue of communications with Dr. Blount when they affirmatively waived objection to Exhibit 766, which is a March 16, 1998, letter between Mr. Hatcher at Mehaffy and general counsel from Johnson & Johnson, and that is also discussing Johnson & Johnson communications with Dr. Blount.

So --

MR. BLOCK: I think you meant 767.

MS. SAMADI: What did I say?

MR. BLOCK: 766.

MR. SAMADI: Exhibit 767 is what I mean, Exhibit 767.

Your Honor, it is also not work product. We know from the privilege log that it was written by Dr. Blount and so it is not attorney work product over the -- as you have already ruled in the Hoffman case, it has to be actual attorney thoughts and processes and it is not here.

And although they have not made any allegation that it is trial preparation material under 3101(d)(2) on their

privilege log, I expect them to in rebuttal; and we also believe it does not warrant that, even that conditional protection.

Well, first of all, they never even alleged it on the log; and even if they have, they haven't proved what you have to show under 3101(d)(2), including that it was created solely for litigation or that Dr. Blount was any kind of consultant at that time.

If you look at 767, the March 16th letter, I believe they were still discussing whether or not they even -- she would even be consulting or they wanted to even hire her. No decision had been made; and so a month later, how are we supposed to know if that consultant relationship even occurred?

And, your Honor, even if it initially did fall under 3101(d)(2), that's a conditional privilege; and we have shown substantial need in this case to get it and the inability to get it elsewhere.

As I've described, what Dr. Blount told Johnson & Johnson about asbestos and talc has been the heart of this trial. So it is very important, and we affirmatively have shown that we can't get it from Dr. Hopkins, as he testified that he had never seen it. So the only place that we can get the document is from Johnson & Johnson.

My co-counsel just reminded me, Dr. Hopkins

testified that it was never in the possession of Johnson & Johnson. It was in the possession of the law firm. So it would also be necessary for us to get because if it is in the possession of Johnson & Johnson -- and which we assume it is because it is on their privilege log -- then what Dr. Hopkins testified to is simply not true.

So we have shown substantial need in that way, too.

MR. KURLAND: So a couple of things, and we did not submit anything in writing on this because this sort of came in late the other day.

But, with regard to the timing of this request, there's a protective order that the parties agreed to in the case. If I may hand this up (handed up to the Court) which creates a 20-day notice period to challenge something with a privileged designation.

This is Section 10. It is on page 8; "And if at anytime a party wishes for any reason to dispute the designation of discovery material, the person shall notify the designating party such a dispute in writing specifying the Bates number. The designated party shall respond within twenty days of receiving the notification. If the parties are unable to amicably resolve the dispute, then in accordance with the governing CMO, the party disputing a designation shall first schedule a telephone conference

between the Special Master and the parties. Only after compliance with the CMO may the parties file motion seeking relief in connection with the protective order."

So that's been the sort of operating thing here.

The plaintiffs have unquestionably been aware that this document was on our privilege log since we produced it several years ago, this document was originally produced. They attached the privilege log to their letter.

The first one is dated June of 2017. The next one is dated November of 2018. There's been a privilege claimed over this document both times.

The plaintiffs offered Exhibit 13. They say we waived any objections by not objecting to it when they offered it.

That document was never on our privilege log. We have never claimed a privilege over Exhibit 13 that was admitted.

Same thing with Exhibit 767. They say when we came in here and argued about that document in court, we waived privilege over that document. We never asserted privilege over that document.

Yet, when they offered Exhibit 13, when they received -- when our production was made, this was an attachment to what they have now marked as Exhibit 13. These documents were all produced together.

This document was withheld. The basis we asserted is work product. We believe that applies today.

But the point is if they had an issue, if they wanted this report, it wasn't a secret. If they wanted to have a dispute about the privilege status of his report, the time to do that was long before we came in here to try this case and, certainly, long before we're on the eve of closing arguments.

So, that raising this now is just simply untimely. They have been on notice and able to raise this issue and aware that we have withheld this document for a privilege since we made our production going back several years ago.

So that's our first argument.

Setting that argument aside for a moment -- even though we believe it is dispositive -- we, nevertheless, believe that the document was properly withheld as work product.

You can't waive work product. And even choosing to waive work product with respect to certain materials does not waive work product with respect to all materials on that subject, unlike the attorney-client privilege.

And I'll draw the Court's attention to a case we talked about several times that lays out the distinction between work product and attorney-client privilege very clearly, I think; and that's the Charter One Bank vs Midtown

Rochester case from Justice Stander in Monroe County, Supreme, from 2002.

And that -- in that case, there's a number of documents in question, and there's various privileges asserted. And with regard to work product, the Court explains that "the work product of an attorney shall not be obtainable. This affords absolute immunity from disclosure to the attorney's work product." It says "Waiver of the attorney-client privilege does not prevent a document from being protected as work product of an attorney. Whether or not privileged, a record may qualify in whole or in part as attorney work product or even trial preparation materials."

The court goes on, "The disclosure of a document protected by the work product rule does not result in a waiver of the privilege as to other documents."

So we don't believe by not asserting privilege over the letter, we are -- or work-product privilege over the letter, we are precluded from asserting it over the attachment.

And with regard --

THE COURT: What about when the work product is nothing legal?

MR. KURLAND: So, your Honor, in that regard, I'll draw the Court's attention to the 1st Department case in Hudson Insurance Company versus Oppenheim, a 2010 case,

which states as we've already discussed in court about consulting expert reports.

The 3101(c) privilege, it says -- this is discussing a draft consulting expert report. Says, "Furthermore, the documents are subject to the attorney work-product privilege. See 3101(c). Such privilege extends to experts retained as consultants to assist in analyzing preparing the case as adjunct to the lawyer's strategic thought processes, thus qualifying for complete exemption from disclosure."

And that is the law in New York as we discussed in this case with respect to the papers that Dr. Mezei had prepared, that he testified about preparing and submitted to counsel that we didn't turn over and he's a testifying expert.

Work product that is prepared by consulting experts is protected from disclosure, and we believe that the document in question was a draft consulting-expert report that was prepared for counsel, and there's no surprise that document wasn't in Johnson & Johnson's possession.

It was prepared for Johnson & Johnson's outside counsel in the context of litigation; but whether or not it is in the context of litigation, doesn't even matter for 3101(c). It is not the conditional privilege.

Now even if the Court disagrees that a consulting

expert's report is protected by 3101(c) in the face of the authority from the 1st Department, we think 3101(d) conditional privilege would still apply to this document because the plaintiffs have not established there's a substantial need. And even if they did, the substantial need would be for underlying factual information considered by the consulting expert; not the expert's assemblage of that information or their conclusions regarding that information.

It would only be the underlying factual information itself, and that's all they would be entitled to.

So, we stand by our privilege assertion. We believe that plaintiffs' objection to our production of this document and their challenge to our privilege assertion is untimely.

But, you know, if the Court does want to conduct an in-camera review of the document, we are prepared to do that; but we do not believe -- we believe this document was appropriately withheld; that it continues to be protected by work product and we are under no obligation to produce it in this case at this time.

THE COURT: Let me ask about the timeliness argument.

What do you have to say about that?

MS. SAMADI: Sure, your Honor.

Dr. Hopkins got up on the stand and said that the article or the report belonged to a law firm in Texas. So, he's put it at issue; and in this case and we, you know -- we're unaware that he was going to testify to that.

So it is relevant to show that that testimony was misleading, and we wouldn't have known that that was accurate or that we needed this document to potentially impeach that. We're kind of arguing with our hands tied behind our back because we haven't seen the document.

But assuming that it was not, in fact, withheld from Johnson & Johnson, then we could use it to impeach him at that time.

I do agree -- and Johnson & Johnson has also taken a stand in this trial that Dr. Blount never found asbestos in their talc, and so I think that also is relevant and it's been a big issue in this case.

The protective order I would like to point to paragraph number 17, where it says: "Modification permitted. Nothing in this order shall prevent any party or other person from seeking modification of this order or from objecting to discovery that it believes to be otherwise improper."

And so, you know, of course, this Court has the authority during trial once the evidence has come out to determine whether or not a particular single document is

discoverable or not.

And I would also make the point that the rule of completeness kind of applies here. They have produced the letter and they have produced some of the attachments, but they haven't produced a single attachment.

THE COURT: I don't know that I'm going to reach the issue, but may I see the document that we're talking about?

MR. KURLAND: You may, your Honor.

THE COURT: I'll return it to you in just a moment.

MR. KURLAND: Yes, you may. And I'll just say, also, that Dr. Blount was deposed by plaintiffs in the context of this litigation. The plaintiffs in this case offered her testimony over our objection, and Dr. Blount certainly would have personal knowledge of what she did. So, she certainly could have been asked about her work at that time.

And I'll, also, just note that Dr. Hopkins did not put this at issue. Dr. Hopkins was presented -- and I don't have his testimony right in front of me, but my recollection is very clear that Dr. Hopkins was presented with Exhibit 13 and asked, Where is the attachment? And he was asked where is the attachment five or six times until the Court sustained our objection to that question. Dr.

Hopkins has no knowledge of this.

This exhibit was attached to a letter that was sent to a law firm, and there's no indication that ever went to Johnson & Johnson and there's nothing to impeach Dr. Hopkins on.

So with that, I'm happy to provide the Court with a copy of the document for in-camera review; and, again, we stand by our privilege.

MR. BLOCK: Your Honor, I just want to comment on what Dr. Hopkins said because it was nonresponsive and it was an attempt by Dr. Hopkins to not answer the question, and then put something in front of the jury to try to have the jury favor Johnson & Johnson or review the situation favorably to Johnson & Johnson.

I said to him, Where is your report? He said -- his answer would be, I don't know, or he would know where the report is.

Instead, he comes out with this idea, he said -- and we could find the transcript. He said, It is the property of the law firm, and I think he said it would not have been received in New Brunswick. He said it was the property of that law firm which, you know, for someone who has been the corporate representative for Johnson & Johnson in all these cases, then that's not true.

It wasn't the property of the law firm. It was

something that was provided to Johnson & Johnson. It is in their files.

And I think, I think, your Honor, on the privilege issue, I just want to say this. Dr. Blount, if there ever was a privilege, the substance of the opinion hasn't been provided in the letters that are in evidence, that Dr. Blount's opinion there's asbestos in Johnson's baby powder. But what we don't have is the report which gives details about asbestos in talc and may even talk about asbestos in Johnson's Baby Powder and provides detailed information that was in the hands of Johnson & Johnson on this very critical issue where we have a company that's taken position in this trial that there is never asbestos in baby powder. They never had a reason to believe there was asbestos in baby powder, and these letters are kind of being marginalized as what basis does she really have? Well, the basis was set forth in the expert report.

MR. KURLAND: I'll just respond to that briefly.

Notwithstanding our privilege claims over this document, we haven't discussed the substance of it; and the plaintiffs have never seen it, but they're making assumptions about what's in the report.

The Court can review it and then maybe we can talk about it, but we believe it is entirely irrelevant and I'll also just note that there is -- for the Court's information,

there's no indication that Johnson & Johnson -- our privilege log and document production actually makes this clear. But what the litigation files maintained by the Mehaffy & Weber firm that were swept up in discovery in this case, but just like the Windsor Minerals files that we were talking about this morning that were swept up in discovery, there were things that were produced throughout this litigation that were never actually in the possession of Johnson & Johnson, the client.

There was a fight in the MDL about whether we needed to produce materials that were prepared in connection with prior litigation. There was a huge fight about that. This was part of that, and Mehaffy & Weber litigation files to a great extent were produced as part of the MDL discovery, which was turned over in this case; but there's still no indication that any of this actually ever went to Johnson & Johnson, the defendant, as opposed to getting swept up in litigation.

So I don't know before we argue more hypotheticals if it is better to just allow the Court a few moments to review the document; and then if you have a any questions for us regarding the document, we're happy to address them, but we would like to do that in-camera.

MR. BLOCK: Your Honor, there is a representation made by Mr. Kurland, and I just want to clarify what

representation was just made.

I think what Mr. Kurland represented in court is that this report from Dr. Blount was only received recently by Johnson & Johnson in a sweep, some kind of sweep involving MDL discovery.

I don't know if Mr. Kurland is telling the Court that they don't have an enclosure letter showing that it was received in 1998 by Johnson & Johnson or correspondence.

What I'm saying is if Mr. Kurland is saying to the Court that he knows that this expert report or that this report from Dr. Blount, the enclosure to the 1998 letter, if he says he knows that it was held by the Texas law firm until the last couple of years when discovery was done in the MDL, then I believe some evidence should be presented as to that.

Conversely, if there's correspondence that shows that that report from Dr. Blount was received back in 1998 or 1999 during the time they were fending the Coker case, then that should be presented; but there were representations made about that, but no evidence has been presented. And I think Mr. Kurland is talking about it because I think it may be a material point here.

(Continued on next page)

MR. BLOCK: But I haven't seen any evidence, and if there's some other letter in the privilege log that's being withheld, you know, where this report is discussed, you know, then that should be provided.

MS. SAMADI: And, your Honor, one more point I would make is that -- clearly -- that J&J attorneys recently have had it and, likely, had it when they deposed Dr. Blount. So, depending on what's in the letter, or the report -- and he's right; I haven't seen it, but depending on what's in there, their cross-examination of Dr. Blount could have been, you know, where they questioned -- they essentially questioned her integrity and her methods and all of this, when, in reality, they had a report from her that, allegedly, they sought out years and years ago.

And so, the jury is entitled to know if they are attempting to -- the relationship between Dr. Blount and Johnson & Johnson and what she told them, if they're now trying to weigh the evidence of their cross-examination.

MR. BLOCK: They said, on cross-examination of Dr. Blount in her video deposition -- and we could find this, also -- "You don't have anything to back up what you're saying." I mean --

MR. KURLAND: The document -- the production in which this document was withheld as protected by work product was made prior to Dr. Blount's deposition. If the

plaintiffs were interested in obtaining this document, they could have made this application at that time, and they did not make that application at this time [sic].

MR. BLOCK: When they cross-examined Dr. Blount, as I was saying, they said to her -- and we can look at the transcript -- "You don't have anything to back up what you're saying. We don't have any of the reports; we don't have anything in writing to show what you're saying is true."

And so, I think the point Ms. Samadi is making is that, you know, they can't -- you know -- they can't go on offense like that if they're holding something that really destroys that type of argument, and that type of cross-examination would not have been in good faith.

MR. KURLAND: Well, I think the Court should take a moment to review the documents; but I think plaintiffs' arguments are based on an assumption about what the report says, which the report did not in fact say at all.

MR. HARTLEY: Are we -- are we all --

Is it clear now that this is, in fact, the report that was attached to the letter? Because we only assume it based on its place in the Bates range.

MR. KURLAND: I pulled out the Bates number and looked at the document because it has the slip sheet.

MR. HARTLEY: I understand that. I'm asking you,

are you representing that it is the report?

MR. KURLAND: I don't know. I know what document was withheld with that slip sheet, and so that's what I pulled. And I did not work at Mehaffy & Weber in the 1990s and I have no personal knowledge of what was transmitted with that letter when it was sent. But the document that was withheld was the Bates number -- that (indicating) is the document that had a slip sheet.

MR. HARTLEY: And it's from Alice Blount.

THE COURT: Can I say? That much, can I say?

MR. KURLAND: I leave it to the Court's discretion, but --

THE COURT: Yeah, this (indicating) is the document.

MR. HARTLEY: Okay, thank you.

THE COURT: It's clear.

MS. SAMADI: And just for the record, that is document Bates number J&JNL6_000052428.

MR. KURLAND: No.

THE COURT: It's the one that matches up with J&J-0049150; and, very coincidentally, it is -151.

MR. KURLAND: Right.

THE COURT: But that's not the only reason why the Court is satisfied that this (indicating) relates to what we're talking about.

MR. KURLAND: It doesn't have a production Bates number on it because it was never produced, but it has a document ID number on it and it's the next sequential document ID number. It's from the --

THE COURT: That's exactly what it is.

MS. SAMADI: After Exhibit 13 is the Bates number that's right behind the letter that we --

MR. KURLAND: Yes. The -- yes. In this case, the document that plaintiffs have put into evidence as Exhibit 13 bears the serialization J&J-0049150.

MS. SAMADI: Okay.

MR. KURLAND: The document that was withheld begins with the serial number J&J-0049151, which is the document that is the report that we withheld and the Court is looking at now.

THE COURT: It's it. And there are other reasons why I say that it's it, beginning with the title of it.

MR. HARTLEY: A report of Alice Blount, question mark.

THE COURT: Okay, I think it's clear that it's related; it's directly related, and responds to.

So just give me a minute to talk about it and then I'll come back and we'll go on to the next issue.

(Recess.)

THE COURT: Ms. Samadi, so I have a question for

you --

MS. SAMADI: Okay.

THE COURT: -- and then I will return the document.

(Pause.)

MS. SAMADI: Yes, your Honor.

THE COURT: I'm a lawyer representing a client; I hire you as my expert; I ask you a question dealing with science; you give me an answer.

Is that work product, or not?

MS. SAMADI: Absolutely not, your Honor, under the Hoffman case, because it doesn't base -- come from the legal expertise. I can find that case, your Honor.

Yes, here (indicating) it is.

It says --

Sometimes, even if a lawyer wrote it and it was scientifically based, it wouldn't be protected, I think.

But it says: "Not every manifestation of a lawyer's labors enjoys the absolute immunity of work product. The exemption should be limited to those materials which are uniquely the product of a lawyer's learning and professional skills, such as materials which would reflect his legal research, analysis, conclusions, legal theory or strategy."

And so -- you know, I don't know about you; I didn't take any science in law school. So it's not the

result of his legal education or his legal strategy.

So I would answer your question no, your Honor; it is not protected.

MR. KURLAND: And if I may just briefly respond, your Honor, the Hoffman case, upon which the plaintiffs rely, a 1980 First Department case, 758 A.D.2d 207, addresses whether an attorney has an obligation to turn over the names and addresses of witnesses it has identified. So that language about it doesn't come from the attorney's thinking has to do with the names and addresses.

And the Hoffman case (indicating) is directly at odds with the 2010 Hudson Insurance case from the First Department, 72 A.D.3d 489, that says: "3101(c) privilege extends to experts retained as consultants to assist in analyzing or preparing a case, the adjunct to the lawyer's strategic thought process, thus qualifying for complete exemption from disclosure," and citing a number of other cases."

MS. SAMADI: Your Honor, the Hoffman case was stating a point of law which we cited it for. If you would like a different factual -- a factually distinct, other case that cites the exact same point of law, I will point you to Brooklyn Union Gas v. American Home Assurance Company, 23 A.D.3d 190, where it says: "Attorney work product applies only to documents prepared by counsel acting as such and to

materials uniquely the product of a lawyer's learning and professional skills, such as those reflecting an attorney's legal research, analysis, conclusions, legal theory or strategy." And that cites to other cases, as well.

MR. KURLAND: And Brooklyn Union Gas was an insurance company's claims file, and insurance companies are required to turn over their claims files because they're prepared in the ordinary course of business in determining whether or not they're going to provide coverage, and that -- there's a long line of cases on that. But again, they were claiming privilege over -- an insurance company, a defendant insurance company, was claiming privilege over its claims file, saying it was work product; and insurance company claims files are not work product, generally speaking.

So that's another distinguishable case.

THE COURT: Yeah. We have a whole bunch of cases that say that this sort of thing is work product. I don't know how, precisely, I'm going to decide this matter.

I am going to return this document to defendants (handing). Thank you.

MR. KURLAND: Thank you, your Honor.

THE COURT: Next. The next point is, I guess, Dr. Longo.

And thank you.